No. 13050

IN THE

United States
Court of Appeals
For the Ninth Circuit

GILBERT WADDELL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Brief for Petitioner

Petition to Review a Decision of the Tax Court of the United States

JAMES F. BUTLER
400 Contintntal Bank Bldg.
Boise, Idaho
Attorney for Petitioner.

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MOUNTAIN STATES PRESS INC., BOISE

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ADDENDA

Since writing the Brief, to which this Addenda is attached, counsel for petitioner has learned that the Congress of the United States has amended Section 116, I.R.C., by the provisions of Section 321 of the Revenue Act of 1951.

As amended, Section 116 (a) reads as follows, the matter in said ~~paragraphs~~ SECTION changed by said Act being shown in italics:

"(a) *Earned Income from Sources without the United States.*—

(1) *Bona fide resident of foreign country.*—In the case of an individual citizen of the United States, who establishes to the satisfaction of the *Secretary* that he *has been* a bona fide resident of a foreign or countries *for an uninterrupted period which includes an entire taxable year,* amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts constitute earned income (as defined in paragraph (3)) *attributable to such period*; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this *paragraph.*

(3) *Presence in foreign country for 17 months.* —In the case of an individual citizen of the United States, *who during any period of* 18 *consecutive*

months is present in a foreign country or countries during at least 510 *full days in such period*, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts constitute earned income (as defined in paragraph (3)) *attributable to such period*; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this *paragraph*."

It seems apparent that the Congress of the United States has *always intended* that the *bona fide residence,* mentioned in Section 116(a), require only that the taxpayer be present in a foreign country or countries for one full taxable year under circumstances indicating that he was not a mere transient or sojourner, and that if the taxpayer lives in a foreign country and earns his living there, during 17 out of a total of 18 consecutive months, his residence is bona fide and a full compliance with the statutory requirement.

It also seems apparent that the changes in Section 116 which, as it stood, seemed perfectly clear and unambiguous, were made necessary by the fact that the Commissioner, the Tax Court of the United States and, in a few instances, other Courts, insisted upon a showing by the taxpayer claiming the benefit of said Section 116, that he had established and maintained a residence *almost amounting to domicile.* It would seem that Congress has now put it beyond equivocation

that a citizen earning his living in a foreign country may avail himself of the benefits of Section 116, I.R.C., by showing that he lived in a foreign country or countries for 18 consecutive months, including a 30-day vacation elsewhere. Petitioner submits that the Congressional intent so expressed has been the Congressional intent fully expressed by Section 116(a), I.R.C., even prior to the changes indicated.

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PRELIMINARY AND JURISDICTIONAL STATEMENT

This is a Federal income tax case on appeal here from the decision of the Tax Court of the United States, the Honorable Ernest H. Van Fossan presiding (T. 65). The case was heard at Portland, Oregon, on October 26, 1950, and decision entered in favor of respondent on April 11, 1951 (T. 64).

The jurisdiction of the Tax Court of the United States is provided for, generally, by Sec. 1101, I.R.C. The statutory provision under which this action was prosecuted in the Court below appears as Sec. 272(a)(1), I.R.C. That Section, in pertinent part, is as follows:

> "If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed the taxpayer may file a

> petition with the Tax Court of the United States for a redetermination of the deficiency. * * * If the notice is addressed to a person outside of the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days."

In this case, the Commissioner determined a deficiency of $2,362.65 in petitioner's income tax for the year 1947 and on or about March 4, 1949, notified petitioner thereof by letter addressed to petitioner in Kabul, Afghanistan. (See paragraphs I, II and III, petitioner's Amended Petition (T. 5), "Exhibit A" thereunto attached (T. 14), and paragraphs 1, 2 and 3 of respondent's Answer (T. 16), admitting the jurisdictional facts alleged.)

There after and on or about August 8, 1949, petitioner filed his petition for redetermination with the Tax Court of the United States (See docket entry, August 8, 1949—T. 3).

Neither the parties hereto nor the Court below have questioned the jurisdiction of that Court, although it does not appear from the record that the notice to petitioner was given by registered mail and the record appears to indicate that the original petition was filed in the Tax Court on a date more than 150 days after the date of the notice given.

The statutes governing the jurisdiction of appellate courts, under which this appeal has been taken, appear

as Sections 1141 and 1142, I.R.C. In pertinent part, these statutes are as follows:

> SEC. 1141(a)—The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, * * *
>
> (b)(1) * * *, such decisions may be reviewed by the Circuit Court of Appeals for the circuit in which is located the Collector's office to which was made the return of the tax in respect of which the liability arises * * *.
>
> (c)(1) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or reverse the decision of the Board, * * * .
>
> SEC. 1142. The decision of the Board rendered after February 26, 1926, (except * * *) may be reviewed by a Circuit Court of Appeals, * * *, as provided in Section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, * * *.

Petitioner's income tax return for the year 1947 was filed with the U. S. Collector at Boise, Idaho, (T. 5, 16 and 53) within the venue of the U. S. Court of Appeals, Ninth Circuit (Judicial notice). His petition for review was filed with the U. S. Court of Appeals, Ninth Circuit, on July 9, 1951, (T. 4 and 69) within three months aft-

er the decision of the Tax Court, rendered April 11, 1951, by filing the said petition with the Tax Court in accordance with Rule No. 31 of the said U. S. Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

A. THE QUESTION

Was Petitioner, Gilbert Waddell, A Bona Fide Resident of Afghanistan During the Taxable Calendar Year 1947?

The foregoing question is the sole question at issue in this proceeding. Answered in the negative, it was the basis of the Explanation of Deficiency furnished by the Commissioner (T. 15). It was also the only question for decision by the Tax Court of the United States and the only question of fact decided by that Court (T. 63).

The amount of the tax is not in dispute. If the foregoing question is answered in the negative, petitioner will be required to pay the tax assessed. Answered in the affirmative, the parties are left in status quo.

B. THE LAW AND REGULATIONS

This case is governed by Section 116, U. S. Internal Revenue Code, the material provisions of which are as follows: See Amendment, Revenue Act of 1951 Addenda, pp. 8, 9 and 10.

SECTION 116. EXCLUSIONS FROM GROSS INCOME

* * *, the following items shall not be included in gross income and shall be exempt from taxation under

this chapter:

(a) *Earned Income from Sources Without the United States*

(1) *Foreign Resident for Entire Taxable Year*

In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States * * *, if such amounts constitute earned income as defined in paragraph (3); * * *

(2) * * *

(3) *Definition of Earned Income*

For the purposes of this sub-section, "earned income" means wages, salaries, professional fees and other amounts received as compensation for personal services actually rendered, * * *

In addition to the foregoing statutory provisions, and interpretive thereof, the Commissioner of Internal Revenue has promulgated the following Regulation, having the force and effect of law:

Regulations 111, Section 29.116-1 (As amended by T.D. 5373, May 23, 1944)

"Earned Income from Sources Without the United States.—For taxable years beginning after

December 31, 1942, there is excluded from gross income, earned income in the case of an individual citizen of the Uniter States, provided the following conditions are met by the taxpayer claiming such exclusion from his gross income; (a) It is established to the satisfaction of the Commissioner that the taxpayer has been a bona fide resident of a foreign country or countries throughout the entire taxable year; (b) such income is from sources without the United States; (c) such income would constitute earned income as defined in * * * Section 116 (a)(3) for taxable years beginning after December 31, 1943; and (d) such income does not represent amounts paid by the United States or any agency or instrumentality thereof. Hence, a citizen of the United States taking up residence without the United States in the course of the taxable year is not entitled to such exemption for such taxable year. However, once bona fide residence in a foreign country or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a bona fide resident of a foreign country. Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the *principles* of Sections 29.211-2, 29.211-3, 29.211-4 and 29.211-5 relating to what constitutes residence or nonresidence, as the case may be, in

the United States in the case of an alien individual * * *."

Sections 29.211-2, 29.211-3, 29.211-4 and 29.211-5, as above stated, deal with the residence status of aliens. Section 29.211-3 does not seem to have any bearing upon this case. In order that the *principles* of Sections 29.211-2, 29.211-4 and 29.211-5 may be more intelligently applied, those Sections are set forth below, in material part, with interpolations where necessary to indicate the application of the Regulations to U. S. citizens residing abroad, rather than to alien individuals residing in the U. S. Variances of language from that appearing in the Regulations as issued are indicated by italics.

SECTION 29.211-2 — *Definitions* — * * * A *citizen* actually present in *a foreign country,* who is not a mere transient or sojourner, is a resident of the *foreign country* for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to *the United States* is not sufficient to constitute him a transient. If he lives in *a foreign country* and has no definite intention as to his stay, he is a resident. One who *goes to a foreign country* for a definite purpose, which in its nature may be promptly accomplished, is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and

to that end the *U. S. citizen* makes his home temporarily in *a foreign country,* he becomes a resident, though it may be his intention at all times to return to his domicile *in the United States* when the purpose for which he *went* has been consummated or abandoned. *A citizen* whose stay *in a foreign country* is limited to a definite period by the immigration laws is not a resident of the *foreign country* within the meaning of this section, in the absence of exceptional circumstances.

SECTION 29.211-4 — *Proof of Residence* — The following rules of evidence shall govern in determining whether or not *a U. S. citizen* within *a foreign country* has acquired residence therein within the meaning of Chapter 1. *A citizen,* by reason of his *citizenship,* is presumed to be a *resident citizen of the U. S.* Such presumption may be overcome—

(1) * * *

(2) in other cases by (a) * * * or (c) proof of acts and statements of *a citizen* showing a definite intention to acquire residence in *a foreign country* or showing that his stay in the *foreign country* has been of such an extended nature as to constitute him a resident. * * *

SECTION 29.211-5—*Loss of Residence*—A *U. S. citizen* who has acquired residence in *a foreign country* retains his status as a resident until he abandons the

same and actually departs from the *foreign country*. An intention to change his residence does not change his status as a *resident of a foreign country* to that of a *resident citizen*. Thus, *a citizen* who has acquired a residence in *a foreign country* is taxable as a *foreign resident* for the remainder of his stay in the *foreign country*.

C. THE FACTS

Most of the evidentiary facts were agreed to, and presented to the Court below on written stipulation (T. 18-24), to which were appended Exhibits No. 1, 2 and 3 (T. 24-44). By oral stipulation at the hearing on the case (T. 77), Exhibits A-1 to A-10, inclusive (T. 45-52B), and Exhibits E-1 to E-5, inclusive (T. 79-83). were admitted in evidence as joint Exhibits, along with Exhibits No. 1, 2 and 3, attached to the Stipulation (T. 24-44), which were intended to be redesignated as B-2, C-3 and D-4, respectively.

In its Findings of Fact and Opinion, entered April 11, 1951, (T. 53-63) the Court below found the facts in accordance with those agreed to in the said Stipulation (T. 53).

As stipulated by the parties or derived from the uncontroverted testimony of petitioner's witness, and found by the Court below, the facts are:

(1) that petitioner is an individual citizen of the United States (T. 53);

(2) that respondent, Commissioner, determined a deficiency of $2,362.65 in petitioner's income tax for the year 1947 (T. 53) and so notified petitioner (T. 14-15) and (T. 5 and 16);

(3) that petitioner was physically present in Afghanistan from June 13, 1946, to the date of the trial, October 26, 1950, (T. 58) a period of four and one-third (4 1/3) years, except for two (2) vacations in the U. S.;

(4) that at all times while in Afghanistan, petitioner was employed as an engineer by an American corporation (T. 58);

(5) that petitioner's entire income during the calendar year 1947 was earned by him while employed in the Kingdom of Afghanistan, where he was physically present during the whole of that year (T. 58). Thus petitioner's income was from sources without the United States and was earned income as defined in Section 116(a)(3). Similarly, the facts found prohibit a finding that petitioner's income represents amounts paid by the United States or any agency or instrumentality thereof;

(6) that prior to leaving the United States in 1946, petitioner expressed the thought that, except for vacations, he would be gone from the United States all of his remaining gainful life (T. 60-61);

(7) that during his visits in the United States petitioner expressed himself as expecting to return to Af-

ghanistan as soon as possible (T. 61).

The foregoing facts constitute petitioner's case in chief and are believed by petitioner to satisfy every requirement of Section 116, I.R.C. (above quoted) and the Commissioner's own Regulations. Other facts are set forth in the Stipulation. These are of two (2) kinds: (1) Facts agreed to, such as petitioner's marital status, intended to apprise the Court of facts present or absent from this case which distinguish this case from others, and (2) agreed facts thought to bring this case within the orbit, or partially so, of other decided cases. These facts will be discussed in the Argument.

SPECIFICATION OF ERROR

Petitioner makes the following assignment of error:

That the Tax Court of the United States erred in finding as an ultimate fact that petitioner was not a bona fide resident of Afghanistan, a foreign country, during the entire year 1947, and in its decision, based thereon, that petitioner was not entitled to the statutory exemption from taxation of compensation received for services performed in a foreign country and that petitioner was deficient in his income tax for the year 1947 in the amount of $2,362.65 (T. 61-64 and T. 69).

Petitioner will here show that the finding of ultimate fact by the Court below is inconsistent with the probative facts stipulated by the parties and found by the Court

below, and is contrary to the governing statutory law and Regulations applicable to this case.

ARGUMENT

Analysis of Sec. 116, I.R.C., hereinabove quoted, shows that petitioner is entitled to the benefit of that Section upon showing that (a) he is an individual citizen of the United States, (b) he is a bona fide resident of a foreign country (c) during the entire taxable year, and that the income was (d) received from sources without the United States, and (e) constituted "earned income" as defined by the statute. Most of these elements stand admitted.

Respondent admits, and the Court below found, that petitioner (a) was and is an individual citizen of the United States (T. 53); that he was (b) physically present in Afghanistan for four and one-third (4 1/3) years after June 13, 1946, except for vacations, and during the entire year 1947 (T. 58); (c) that his entire income was earned by him in Afghanistan as an employee of Morrison-Knudsen Afghanistan Inc., an American corporation operating solely in Afghanistan (T. 57 and 58), and, hence, was received by him from sources without the United States, and (d) being salary received by him for services performed as an engineer (T. 58) constituted "earned income" as defined in Sec. 116(a)(3) I.R.C.

It was contended by respondent and found by the

Court below, (T. 63) that petitioner was not a bona fide resident of Afghanistan during the entire year 1947, within the intendment of Sec. 116, I.R.C. It remains only to determine whether that finding was or was not "in accordance with law." (See Sec. 1141(c)(1), I.R.C., quoted above.) The law applicable is Section 116, I.R.C., analyzed above, the respondent's own Regulations (set forth above) and the case law. The law will be here discussed in that order.

No definition of a "bona fide resident of a foreign country" appears in the statute. The Commissioner, respondent here, has defined the term at length in his Regulations. Petitioner's position is that he is a "bona fide resident of a foreign country" under respondent's own definition.

(1) Vacations—Petitioner, after working in Afghanistan for two full years, June 13, 1946, to June 13, 1948, visited in the United States (T. 58) and spent approximately seven months in the U. S., resting, traveling, visiting friends and relatives, and receiving a variety of medical treatments (T. 58-59 and 90). He did no work and earned no income (T. 59). He expected to return to Afghanistan earlier than he did, but was delayed by the extensive medical and dental treatments required (T. 95). From October 28, 1949, to May 11, 1950, petitioner again visited the U. S. (T. 59). This time his return and stay in the U. S. was not voluntary, but was occasioned by business considerations, although

the vacation was welcome in view of the fact that petitioner intended and expected to return to Afghanistan for an uninterrupted term of several years (T. 91). During this second vacation of about six months, petitioner did no productive work and earned no income (T. 59). He returned to his employment at the earliest possible time that business conditions would permit (T. 91). He returned to his former work—not a different job—after each vacation. He last was in the U. S. on May 11, 1950, (T. 58) and has not since returned. He was still in Afghanistan, working at the same job for the same employer in the same country on the date of the trial, October 26, 1950, (T. 58) and has since married and now resides with his wife in that country, where he has been promoted to chief engineer in charge of construction of the large irrigation storage dam there being constructed. The dam will not be completed for several years (T. 88 and 60-61).

As to the subject of Vacations, respondent Commissioner has written (Reg. 111, Sec. 29.116-1): "* * * However, once bona fide residence in a foreign country or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a bona fide resident of a foreign country. * * *"

(2) TRANSIENT OR SOJOURNER — The respondent Commissioner says, in effect (Reg. 111, Sec. 29.211-2): *A citizen actually present in a foreign country, who is*

not a mere transient or sojourner, is a resident of the foreign country for the purposes of the income tax. That Regulation has the force and effect of law and is binding upon the Commissioner as well as petitioner.

The Court below found that, except for vacations, petitioner was actually in Afghanistan for 4 1/3 years; that he was there during the entire year 1947 (T. 58); that he was during the whole period living there, working there, earning his living there (and nowhere else) and that his entire income during the year 1947 was earned by him as compensation for services performed there. If he was a transient or sojourner anywhere, it was while he was in the U. S. as a mere visitor, traveling, visiting his family, attending to his health, doing no productive work and earning no income (T. 59, 90 and 95.)

(3) Intent —

(a) Rule of Evidence — Respondent, Commissioner, has prescribed rules of evidence governing taxpayers claiming the benefit of Sec. 116, I.R.C. (Reg. 111, Sec. 29.211-4, above). In effect, he has said that a U. S. citizen is presumed to be a resident of the U. S., but that the presumption is overcome by proof of acts and statements of the citizens showing a definite intention to acquire a residence in a foreign country, or showing that his stay in the foreign country has been of such an extended nature as to constitute him a resident.

Accordingly, petitioner proved by the testimony of Mrs. Burda (T. 85-100) that petitioner stated to her, before he left for Afghanistan in May, 1946, that he expected (intended) to work in Afghanistan for the rest of his professional life (T. 88 and 61). Each time he returned to the U. S. on vacation, he expressed his intent to return to Afghanistan as soon as possible (T. 61 and 90), to resume his job, which he estimated would last at least ten (10) years. These statements, we submit, are efficient to overcome the presumption of residence in the U. S., when coupled with proof of his subsequent acts and conduct not inconsistent therewith.

When the petitioner left the U. S. in May, 1950, he stated that he intended to remain in Afghanistan for about five years, without taking vacations (T. 91). At the time of trial, petitioner could show that he had lived in Afghanistan, except for vacations, only 4 1/3 years. At the present time, he has lived and earned his sole income there for 5 1/2 years. The statements made by him as to his intent are borne out and corroborated by his subsequent conduct. We submit that the acts and statements proved by petitioner and found by the Court below, as above-described, show a definite intent to acquire a residence in Afghanistan, in the absence of proof that he maintained a residence elsewhere. Certainly petitioner has shown that his stay in Afghanistan "has been of such an extended nature as to constitute him a resident." Only in New England is one considered "a

mere transient or sojourner" after he has lived and earned his income there for 5 1/2 years.

(b) OTHER CONSIDERATIONS — In defining "a bona fide resident of a foreign country" (Reg. 111, Sec. 29.-211-2, above), respondent says a U. S. citizen is such, if he "is not a mere transient or sojourner." He does not define "sojourner," but defines "transient" at considerable length, and says that it is all a matter of intent. Petitioner went to Afghanistan expecting and intending to live and work there for a long and indefinite time, variously estimated at approximately ten years (T. 88 and 93) and "all his remaining gainful life." (T. 61 and 88.) He intended to come home to the United States to retire. As to this, respondent himself has said: Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to the United States is not sufficient to constitue him a transient. *If he lives in a foreign country and has no definite intention as to his stay, he is a resident there.*

Petitioner was almost 50 years of age when he first went to Afghanistan (T. 54). His health was not good (T. 95) and his back, once broken, might give out at any time. The Russians on the north border of Afghanistan might stop the reclamation project, so hurriedly being pushed to completion at the behest of the Department of State of the United States. Conscious of these uncertainties, petitioner avers (T. 8) that he intended

to enter upon a career of foreign employment, to live and work in Afghanistan for the remainder of his productive, professional life (T. 8), of whatever length that might be, and, if not in Afghanistan, then in some other foreign country (T. 9 and 88). Certainly, petitioner has lived in Afghanistan for 5 1/2 years "with no definite intention as to his stay." Respondent says that makes petitioner a resident of Afghanistan. And we say that respondent is bound by his own rule.

Respondent says further: One who goes to a foreign country for a definite purpose, which in its nature may be promptly accomplished, is a transient (Reg. 111, Sec. 29.211-2). That rule is no solace for respondent here. There is no evidence in the record that petitioner went to Afghanistan for a purpose which could be promptly accomplished. Even if the Court should believe the unlikely hypothesis of respondent, that petitioner went to Afghanistan for the sole purpose of fulfilling a two-year employment contract, a two-year contract cannot be accomplished "promptly" even by bureaucratic standards.

Finally respondent says, in the same Regulation: * * * but if his purpose is of such a nature that an extended stay *may* be necessary for its accomplishment, and to that end the citizen makes his home *temporarily* in a foreign country, he becomes a resident. Petitioner thinks that statement applies to him. He is an expert, trained by the Federal government in the engineering phases of

the construction of earth-dams (T. 7, 19 and 54). He was sent by his employer to Afghanistan to build such a dam. He spent almost three years, June, 1946, to October, 1949, in locating a proper site for the dam and making other necessary arrangements preparatory to building it (T. 20, 21 and 57). He now estimates that it will take 5 years from and after May, 1950, to build the dam (T. 91). That dam is only part of the whole project planned for Afghanistan by its King and the U. S. Department of State, which is interested in making anti-communist farmers out of the Afghan nomads. His employer has negotiated a 4-year contract with the Kingdom of Afghanistan for the primary purpose of building that dam (T. 57), and others. Whether the dam can be built in four years, using Afghan labor under primitive conditions, is an open question. In any event, reclamation projects are not accomplished "promptly." Petitioner went to Afghanistan with a purpose of such a nature that an extended stay *would certainly* be necessary for its accomplishment, and to that end he made, and after 5 1/2 years is still making his home "temporarily" there. Respondent says that under such circumstances one becomes a resident of a foreign country. We do not disagree.

In addition to statements as to his intent made to Mrs. Burda, the *only* witness to testify at the trial in the Court below (T. 88), petitioner in 1946, before he went to Afghanistan and before any thought arose in his mind that an expensive law-suit might arise which would turn

on the question of his intent, wrote a letter of resignation to his former employer, the Bureau of Reclamation (T. 24), which was Exhibit 1, attached to the Stipulation of Facts and admitted in evidence as Exhibit B-2 (T. 54 and 77). The letter was admissible both under the Commissioner's Regulation, above-quoted, and under the "ancient document" exception to the general rule against self-serving evidence. Not only is the letter admissible, it should be *persuasive* as evidence of petitioner's state of mind as early as April 19, 1946. In that letter, a man almost 50 years old resigned from the security of a civil service position (T. 54), and the retirement pension rights appurtenant thereto, to accept employment in a primitive, arid wasteland. Mature reason says this was no boyish response to the call of adventure. A mature and seasoned man in bad health relinquishes security only with the intent to enter upon an assured and permanent employment offering greater compensation. Increased compensation for a short period of two years does not, despite respondent's protest, appeal to a man who may be left at the end thereof partially disabled, past middle-age and unemployed.

(4) Petitioner's Residence in Afghanistan—Respondent thinks it significant (T. 76) that petitioner had no home of his own in Afghanistan, but lived in quarters provided by his employer and ate his meals in the mess-hall. Viewed in the light of the fact that petitioner lived in similar company-built or government-built camps and mess-halls during most of his career in the United States,

that fact begins to look less significant and quite normal. Reclamation projects, domestic or foreign, are built in deserts, far from towns and traditional "residences." Laborer and engineer alike customarily live in any tent, shack or barracks furnished by anyone. Residences in the traditional style are not available to members of construction crews on this type of work.

It is true that, during his career in the United States, petitioner maintained a home for his wife and children. But after his divorce in 1946, (T. 19 and 53) that home was broken up. Thereafter petitioner not only did not have any home, in the sense of a residence structure, in Afghanistan, as pointed out by respondent, he did not own or rent one in the U. S. either (T. 22 and 59). This seems to bring petitioner's case within the Rule in *Swenson vs. Thomas* (5th U.S.C.A.) 164 Fed. 2nd, 783-4, wherein the Court said:

> "But notwithstanding that he established no fixed home in Colombia, or even a settled place of abode, his work requiring him to be ever on the move, it remains true that *he was always living in Colombia, attending to his business there; and that we think constitutes residence there.*" (Emphasis ours.)

Black's Law Dictionary, 3rd ed., defines "resident" as follows:

> "One who has his residence in a place. The term is an elastic one and may mean a person who is

domiciled at a place, or a citizen, *or merely one who is temporarily living at a place, or carries on a business there.*"

(Citing many cases—Emphasis ours.)

The foregoing quotation and definition seem to coincide with the respondent's notions about the subject expressed before this case came to trial. Now respondent says petitioner was not a resident of Afghanistan because he was living there in barracks furnished by his employer. In his Regulation, Sec. 29.211-2, respondent said: * * * but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end *the citizen makes his home temporarily in a foreign country,* he becomes a resident.

It thus appears that the respondent agrees that petitioner needs prove no permanent home in Afghanistan, and a temporary home can be a "bona fide residence," as required by the statute. We find no case holding that a person cannot establish temporary residence in quarters furnished to him without cost by another.

From the fact that petitioner lived in quarters furnished by his employer, and ate in Company mess-halls, respondent and the Court below seem to think this case is governed by the holding in *Downs vs. Commissioner*, 166 Fed. 2nd, 504 (T. 62). In that case, Judge Stephens found controlling facts not present in this case. There, Downs and Hoofnel agreed that they could not take

their wives or families with them. Petitioner has his wife with him in Afghanistan today. He had no wife from the time of his divorce, February, 1946, until his remarriage in July, 1951. In discussing the details of the conditions of their employment, the Court said of Downs and Hoofnel: "It will be seen that persons employed under the contract * * * were handled, controlled and restricted much the same as military personnel." The contractual provisions he found in those cases are not duplicated in petitioner's contract. Judge Stephens himself stated that the difference between the holding of the 5th U.S.C.A. in *Swenson vs. Thomas*, supra, and his own holding in the *Downs* case, supra, was due to the marked differences in the facts of the respective cases. The facts he found were summarized as follows:

> "Neither Hoofnel nor Downs was abroad on foreign trade; their situation had no relation to peacetime economics. Their activities were wholly those of war performed in camps of the United States Government located in a foreign country for strategic purposes under limited consent of a foreign power. In practically all but geography, petitioners were on American soil, actually under the American flag, performing services for the benefit of the American Government, using materials furnished them by the American Government through the American contractor—Lockheed. * * * "

It is submitted that the facts above-recited are not to

be found, either in whole or in part, in the present case.

However, the facts found by Judge Sibley in *Swenson vs. Thomas,* supra, sound very similar to those in the case at bar. Therein, Swenson, an engineer, went to Colombia, South America, under a 3-year contract, terminable on 30-days' notice, to prospect for oil, in charge of a crew of laborers. He moved his camp frequently, and lived in forests and jungles. After three years, he renewed his contract for one more year, and returned to the U. S. after four years there. In his passport application he stated he expected to return in three years. Judge Sibley said: *"We think there is no evidence whatever that there was any want of good faith. Swenson did not live in Colombia to evade taxes or for any bad purpose, but only to do the work he was sent to do.* We think there can be no doubt that his continuous and unbroken living there for four years was 'residence'."

Judge Stephens reasoned that "makes his home temporarily," as used in the Commissioner's Regulation (Sec. 29.211-2), requires that the U. S. citizen living abroad, to constitute himself a bona fide resident of a foreign country, must identify himself *in some degree* with the customs of that country and live under and within such customs. He was unable to see that Downs and Hoofnel, while abroad, became in any degree a part of the foreign scene. But Judge Sibley thought that Swenson was part of the Colombian scene, as he moved

about through the jungles of that country performing his engineering duties. We submit that Gilbert Waddell, petitioner here, was likewise very much a part of the Afghan scene, as he roved for hundreds of miles across the north Afghan deserts, searching for dam-sites, planning for canals, laterals and ditches and performing his engineering duties.

In passing, Judge Sibley calls attention to Sec. 116(a)(2), which extends tax exemption to a U. S. citizen who has been a bona fide resident of a foreign country for two years and returns during the third year. We think it fair to infer that the Congress contemplated that a U. S. citizen might go to a foreign country in 1946, engage in business there in 1946 and the following two years, and return to the U. S. in 1949, entitled to his exemption from taxation as to his income earned abroad during the years 1947 and 1948 and partial year 1949. So far as appears from the statutory language, that whole business transaction could have been accomplished in a total period of *twenty-six months.*

(5) Bona fide —

In the words of Judge Sibley, we repeat: *"We think there is no evidence whatever that there was any want of good faith. Waddell did not live in Afghanistan to evade taxes or for any bad purpose, but only to do the work he was sent to do."*

(6) The Contract —

Respondent attaches significance (T. 76) to the fact that petitioner's contract enjoined him from engaging in trade in Afghanistan and from *interference* with Afghan political and religious affairs (T. 34). Respondent also points out that petitioner paid no taxes to Afghanistan (T. 76), that his employer, by contract agreed to pay such taxes for him if any were levied (T. 33), and agreed to furnish board and lodging or the cash equivalent (T. 32).

Petitioner was brought to Afghanistan by his employer at great expense. It is only reasonable, and the customary practice in most employment relationships, that the employee agree, as Waddell here agreed (T. 27), that he would "devote his full time, attention, skill and ability to the performance of the duties of the position for which he was hired, * * * " That provision would be a reasonable one in any employment contract, whether to be performed in the U. S. or elsewhere. Petitioner could not perform that part of his contract and, simultaneously, engage in trade in Afghanistan. He owed his full productive capacity to his employer.

The contract prohibits petitioner's *interference* in Afghan religious and political affairs. This is not a surprising provision. The Kingdom of Afghanistan is an absolute monarchy—not a constitutional monarchy. Its population is largely wandering nomads of Mohammedan faith, with primitive ideas of justice. The con-

tract was drawn up with this provision, simply to provide the employer with a means of protecting a misguided employee from the swift and terrible consequences if his own acts, however well-intentioned. We wish to point out, however, that participation in political activities is safe, even for a citizen, in only *a very few countries*; and even in our own country political activity is a privilege of the *citizen* not extended to aliens.

Since interference with Afghan political and religious activities is the only matter prohibited, the legal inference is that all other normal activities are permitted to petitioner by his contract, except insofar as they might conflict with his duties to his employer. That should allow petitioner enough latitude to, in the words of Judge Stephens, *identify himself in some degree with the customs of Afghanistan, and live under and within such customs.*

It should be noted that petitioner's contract does not prevent him from following his own religion, nor does it prevent him from *participating* in Afghan religious or political affairs, so long as such participation does not amount to *interference.*

In the *Downs* and *Hoofnel* cases, supra, petitioners were closely supervised even in their off-duty hours. Respondent thinks those cases parallel this case, though he admits that the restrictions on Waddell were few (T. 76), and that Waddell was free to come and go at will, whether during business or off-duty hours (T. 22 and

76), and was free to live in the Afghan towns, at his own expense, if he so desired.

Out of decent respect for his own health, neither the Commissioner nor Waddell would have exercised the freedom of choice so permitted in favor of native accommodations. The Afghans irrigate their food crops and draw their drinking water from the same streams and canals into which they dump their waste and sewage. No rational human would jeopardize his health by eating native food and water even to save money. *A fortiori,* he would not pay a premium to risk the same dangers.

We submit that petitioner's acceptance, without obligation, of board and lodging furnished by his employer was in no degree comparable to the contractual restrictions upon the freedom of movement found in the *Downs* and *Hoofnel* cases, supra.

Finally, respondent points out that petitioner paid no taxes to Afghanistan (T.16). We fail to see the significance of that point, in view of the fact that respondent has stipulated (T. 22) and the Court below found (T. 59) that petitioner owed no taxes to Afghanistan.

There remains the question as to the effect of the employment period of twenty-four months, expressed in the contract. Respondent appears to contend that a citizen, who goes abroad under an employment contract

wherein a definite termination date is expressed, must be held to intend to return to the U. S. at the completion thereof and, therefore, to lack that essential indefiniteness as to the length of his stay required by Sec. 29.211-2 of the Regulations. Petitioner contends (T. 9) that the employment period is provided in the contract for purposes of determining the rights of the parties as to vacation and travel-time pay, transportation allowances and other matters, but was not intended to have any bearing upon the total duration of the employee's employment by his employer.

Reference to the detailed provisions of his contracts, Exhibit C-3 in evidence (T. 25) and Exhibit D-4 in evidence (T. 35), shows that paragraph 5 (Vacations), 6 (Commencement of Salary), 7 (Transportation and Travel Allowance), 8 (Return Travel Expense), 10 (Termination of Contract) and 14 (Withholding from Salary) constitute the bulk of the contracts and are all predicated upon the provisions of paragraph 4 (Period of Employment).

The fact that petitioner has been working for five and one-half (5 1/2) years in the same country, at the same job, for the same employer, under three separate contracts, each of which expressed a two-year employment period, tends to substantiate petitioner's claim that his employment is broken up into two-year phases for fiscal purposes, but is otherwise of a permanent and indefinite duration, as would be the case in any employment of an

individual by a corporation.

(7) Respondent's Answer —

Respondent's Answer (T. 16) is in the nature of an admission of certain jurisdictional facts alleged by petitioner and a denial of all facts not admitted. No new facts are alleged. The effect is simply to force petitioner to the proof of his case. Petitioner believes he has made out a very good case, and has, at least, sustained the burden of proof by proving a prima facie case. Having done so, it remains only to inquire whether the case made out by petitioner is at any vital spot over-weighed by respondent's evidence.

(8) Respondent's Evidence—

Respondent called no witnesses to testify at the trial. He contented himself with an unproductive cross-examination (T. 92-97) of petitioner's witness. His only other evidence consisted of certain facts set forth in the Stipulation of Facts (T. 18) and certain Exhibits, introduced at the trial jointly with petitioner (T. 24-52B and 79-83).

In general, the Stipulation sets forth, briefly, facts favorable to petitioner's case. Stated in bare outline, the Stipulation sets forth as agreed facts all but one of the essential elements required by Sec. 116, I.R.C., as conditions prerequisite to the relief granted by that Section. The essential elements thus admitted and found by the Court below are that (a) petitioner is an individual citi-

zen of the U. S. (T. 18-53); (b) his income during 1947 was received from sources outside the U. S. (T. 21 and 58) and (c) such income was earned income as defined in Sec. 116(a)(3), I.R.C., being salary received for personal services rendered in Afghanistan.

The element not admitted was the requirement that petitioner be a bona fide resident of the Kingdom of Afghanistan during the entire year 1947, and, as to that, petitioner admitted (T. 21) and the Court below found (T. 58) that petitioner was physically present in Afghanistan during the whole of that year.

In that state of the record, what was petitioner required to prove beyond what stood admitted? If his stay, including vacations, of four and one-third (4 1/3) years in Afghanistan could be said to amount to a residence there, then respondent could hope to prevail only by showing that the residence was not in good faith. Has respondent proved any want of good faith on the part of petitioner? Like Judge Sibley in the *Swenson* case, supra, we think not. *The Court below found none.*

But perhaps respondent contends that petitioner's stay in Afghanistan, now extending to five and one-half years, did not constitute residence at all. If so, petitioner is entitled to refer to respondent's own Regulations, which are the only authoritative sources of law on the subject, and prove his case under these Regulations, (hereinabove set forth, and discussed at length and in detail). Petitioner has proved under those Regulations

that he was not a *mere transient or sojourner* in Afghanistan; that he went to that country with the intent to enter upon a career of employment in that foreign country and, perhaps, others, which would last the remainder of his productive, professional life; that that intent was in his mind when he first departed and has not since changed; that he went to Afghanistan for a purpose that, in its nature, would require many years for its accomplishment, to-wit: the construction of a series of earth-dams and the whole enormous reclamation project, of which they were a part, and that, to that end, he has made his home temporarily in that country, and, finally, that he actually did go there, live there, work and earn his living there and establish residence there, which, we think, was bona fide.

Petitioner, according to the foregoing arguments, has made out at least a prima facie case for relief under the statute and Regulations. What evidence has respondent introduced to out-weigh it?

The Stipulation states that in petitioner's passport application of April 13, 1946, he stated that his permanent residence was 316 Broadway, Boise, Idaho. Respondent thinks (T.76) this statement inconsistent with "bona fide residence" in Afghanistan. We think respondent's position unsound for several reasons:

First: Judge Stephens, in the *Downs* case, supra, quotes *Matter of Newcombs Estate,* 192 N.Y. 238, 84 N.E. 950, for the proposition that a person may have

more than one residence, and, hence, that proof of residence in one place does not disprove residence elsewhere. We agree. Proof that Waddell intended to keep a "permanent residence" in the U. S., as well as domicile there, is not effective to disprove a simultaneous bona fide residence in Afghanistan.

Second: The Stipulation goes on to state that 316 Broadway, Boise, Idaho, is the address of the general offices of Morrison-Knudsen Co., Inc. Obviously, then, that was not petitioner's residence, nor would it ever be. Why did he give such an address? The answer is obvious. His home was broken up; he had no home in the U. S. His "residence" was moving about with him in the U. S. even *before he went* to Afghanistan. He didn't even have an *address* of his own. So he gave in his passport application a mailing address through which he could always be reached. That was then his only address and the closest thing to a "residence" that he had.

A man may have more than one residence but, no matter how bereft, *he is entitled to at least one.* If Waddell had no residence in the U. S., even before he left, certainly he should be entitled to claim residence wherever he went to live and earn his living.

Third: In any event, in that passport application (T.47 & 48), petitioner was giving his "permanent residence" address *as of the time the application was made,* April 13, 1946. That has no bearing upon the situs of his residence at any subsequent date. Further than that,

the address is plainly the address given in support of his statement that he was domiciled in the United States, and there is reason to believe that the statement refers to petitioner's *domiciliary* address rather than to his residence. In any event, the statement does plainly state that the address given is a "permanent residence", which, though it probably refers to a domiciliary address, does not preclude the establishment of that "home temporarily in a foreign country," which respondent says will be sufficient residence to satisfy the requirements of the law.

While we are looking at that passport application (T.47), Waddell expressed his intent to return to the U. S. "within three years." That is exactly what Swenson said in his passport application, *Swenson vs. Thomas*, supra.

Prior to June 2, 1947, and apparently on April 28, 1947, (Exhibit A-8) Waddell made application for registration at the U. S. Consulate in Kandahar, Afghanistan, as is required of U. S. citizens living abroad. The application, not dated, is in evidence at Exhibit A-7 (T.51). In it, petitioner states that he has *resided* outside the United States since 1946, in Afghanistan; that his legal residence in the United States is Boise, Idaho, and that he intends to return to the United States within one year to reside permanently. Respondent thinks this is the clincher (T.76). We think it unimportant for several reasons.

The application was made, as above-stated, probably in April, 1947. The form was typed out by someone in the consulate and petitioner signed it because it "looked all right." If petitioner had filled out the blanks personally, the application might have read somewhat differently, as his attention would then have been drawn to the exact wording of the printed form upon which the application was made. However, even so, the intent expressed is the intent of *that date only.* There is nothing to show that it had existed prior to that date or subsequent thereto. There is evidence (T.93-94), inadvertently elicited by respondent's cross-examination, that if petitioner ever had such an intent it was short-lived, and he never mentioned it to his daughter. In his letters to her he said he liked his work (T.93), was satisfied with his working conditions, and never made any statement that he had changed his mind about continuing to work in Afghanistan. The most that can be said of the application for registration is that it shows, if anything, that on the date thereof only, petitioner intended to return in one year to the U. S. to reside permanently.

In that state of affairs, the respondent, himself, provides the solution. He says (Reg. 111, Sec. 29.211-5):

> "A U. S. citizen who has acquired residence in a foreign country retains his status as a resident until he abandons the same and actually departs from the foreign country. *An intention to change his residence does not change his status as a resident*

> *of a foreign country* to that of a resident of the U. S. Thus, a citizen who has acquired a residence in a foreign country is taxable as a bona fide foreign resident for the remainder of his stay in the foreign country."

As we read the foregoing statement of principle, authored by respondent in a less contentious moment, it is not enough, to defeat petitioner's claim under the law, to prove that at some date during his residence in Afghanistan petitioner momentarily intended to leave Afghanistan one year later and then resume his permanent residence in the United States. Respondent places upon himself the burden of showing that petitioner left Afghanistan and *simultaneously abandoned* his Afghan residence. We do not find in the record any proof of such an abandonment when petitioner left Afghanistan in 1948. We do find proof that, within 24 hours after his arrival at his daughter's home in 1948 (T.90), he said he intended to go right back to his work in Afghanistan, after his vacation, which he then thought might be cut short. That evidence is the *only* proof in the record of petitioner's intent at a date near the date of his first departure from Afghanistan.

Furthermore, in *White vs. Hofferbert,* 88 Fed. Supp. 457 (U.S.D.C. Maryland, 1950), Judge Chesnut said: "The only item of evidence introduced by the defendant (Commissioner) in any way tending to contradict the taxpayer was his statement in filling out a printed

~~from~~ form of Application for Registration before the United States Vice Consul at Stockholm in which * * * there was a short sentence reading, 'I intend to return to the United States within *six months* to reside permanently.' * * * However, the statement was entirely satisfactorily explained by the taxpayer. His explanation was that the printed form of application for registration referred to *had relation only to the matter of the validation of his passport* * * *." (Emphasis ours.) Respondent Commissioner *did not appeal* from the adverse holding in that case.

Quite evidently, the printed form signed by White in that case was the same as signed by Waddell here, and for the same purpose. As indicated in the *White* case, supra, White was abroad during wartime, and his passport was required to be validated every six months. *He would not have been permitted to state* a period longer than six months in his application. As indicated by Judge Chesnut, in peacetime a passport must be validated every *two years*. Waddell's passport, issued May 2, 1946, was valid to May 2, 1948. As in the case of White, he would not have been permitted to state that he intended to stay abroad past that expiration date. Hence, in April, 1947, he was *required* to state that he intended to return to the U. S. "within one year." At considerable expense to the government, respondent has furnished Exhibit A-8, appearing between pages 51 and 51A of the Transcript, being, in part, the certificate showing that Waddell's passport was on April 28, 1947, extended to May

2, 1948. This would seem to indicate that Judge Chesnut was not misled, and that when application for registration is made by a citizen residing in a foreign country it has relation only to the *validation* of his passport. The passport purports to be in effect for two years after May 2, 1946, which would include the entire period to May 2, 1948. Why, then, does Exhibit A-8 purport to "extend" the passport, on April 28, 1947, to May 2, 1948? The obvious answer is that the passport was *not extended* —it was "validated" to the original expiration date.

Exhibits A-9 and A-10 (T.52A and 52B) show that on May 26, 1948, petitioner applied for *extension* of his passport. Therein he made *no statements* as to his residence or intended length of stay in Afghanistan. He was going home in June, 1948. If he had not intended to return to Afghanistan, but had intended "to return to the United States to reside permanently," as contended by respondent, it appears that he would not have been interested in having his passport renewed for another two years. Exhibit A-6 (T.50) shows that on May 26, 1948, petitioner's passport was extended to May 2, 1950.

Exhibits A-2 and A-5 (T.46 & 49) are documents filled out by Waddell in order to secure a new passport, the former passport having expired May 2, 1950. The second passport appears to have been issued April 27, 1950, and that appears to have been the approximate date of the application. In the application, Waddell states that he is domiciled in the U. S. with "permanent

residence" at 421 8th Street, Huntington Beach, California. He also states that he has *resided* outside the United States in Afghanistan, and gives dates. He estimates as two years the length of his proposed stay abroad (T.49).

Respondent admits (T.23) and the Court below found (T.60) that the premises at 421 8th Street, Huntington Beach, California, were the residence of Major and Mrs. T. A. Burda, petitioner's son-in-law and daughter, that he had no financial interest in that property and had never lived there except as the guest of his daughter. What does petitioner's statement mean? Does it really mean that he had a permanent residence with his daughter and son-in-law? To the contrary, it would seem to be the strongest possible evidence that he had *no home or residence* of his own in this country, and so he gave his daughter's address, which was his business mailing address (T.91-92) in this country.

But, as in the case of his passport application of April 13, 1946, whether the address so given was a domiciliary residence or otherwise, proof thereof would not be sufficient to disprove a temporary home and bona fide residence in Afghanistan, since this Court has held that a person can have two or more "residences." (*Downs* case, supra.)

The two passport applications having been thus disposed of, we come back to Judge Chesnut's discussion of the facts he found in *White vs. Hofferbert,* supra.

That case seems *exactly* to parallel this case in that, "The only item of evidence introduced by the defendant in any way tending to contradict the taxpayer was his statement in filling out a printed form of 'Application for Registration' before the Vice Consul at Stockholm, in which * * * there was a short sentence reading, 'I intend to return to the United States within six months to reside permanently.' * * * However, the statement was entirely satisfactorily explained by the taxpayer. * * * " We, too, believe that *respondent's only positive evidence* was petitioner's statement, in his Application for Registration, that he intended to return to the United States within one year to reside permanently, and that for the reasons deemed convincing by Judge Chesnut, even that evidence is shown to be only superficial.

(9) Miscellaneous Points—

In order to show the extent of respondent's grasp of the facts in this case, we draw attention to the objection appearing at the top of page 99 of the Transcript, wherein Counsel stated, "I think the Stipulation will show that Mr. Waddell was an employee; he was not a supervisory official in any respect." Attached to the Stipulation are Exhibit No. 2 (C-3) (T.25) and Exhibit No. 3 (D-4) (T.35), both of which are headed "SUPERVISORY EMPLOYMENT CONTRACT."

Although it does not clearly appear in the record, we think that respondent's real point is that a citizen, going

abroad under an employment contract with a fixed termination date, cannot possibly become a bona fide foreign resident because he must be held to intend to return at the completion of his contract.

Subparagraphs (5) of paragraph 5 of petitioner's contracts (T.28 & 38) commence with following language: "In the event this contract is not renewed at the expiration of the period of employment provided herein, * * *." This language seems to indicate that the *parties to the contracts do not consider* that the employee is sent to a foreign country for a two-year period, at the end of which he will be discharged, to return home and not come back. Rather, it supports petitioner's contention, that the employment is indefinite, but broken into two-year periods for fiscal reasons. Further, an examination of the decided cases shows that there was a similar contract in the case of *Swenson,* supra, and that such contracts are customary in cases where the employing corporation is sending personnel to distant lands at great expense. The usual thing is to incorporate, as was here done, provisions in the contract, that if the employee will stay on the job for a required *minimum—not maximum*—period, the company will give him a bonus in the form of return transportation, vacation with pay and other inducements. Good foreign service employees are hard to find. When the company finds one, it *keeps* him, if possible.

(10) Length of Residence Required—

There remains one other question: How long must

a citizen live in a foreign country in order that his residence can be deemed "in good faith" and not subject to question?

The statute (Sec. 116, I.R.C.) would seem to indicate that one full calendar year is the minimum, but *enough.* In *Herman F. Baehre,* 15 T.C. 36 (1950), taxpayer lived in Canada for two years and one month and was held to be a bona fide resident. The Commissioner acquiesces.

In *Seeley vs. C.I.R.* (2nd U.S.C.A.—1951) ..... Fed. 2nd .....; the Tax Court had sustained the Commissioner against the taxpayer. The United States Court of Appeals for the Second Circuit, speaking through the Honorable Learned Hand, reversed the Tax Court, holding taxpayer to be a bona fide resident of England, though he had lived there less than two years—*by five days.* In that case, Judge Hand discusses the whole subject of "bona fide residence in a foreign country," under Sec. 116, I.R.C., and analyzes the statutory and case law and the Regulations with great clarity and true judicial precision. We earnestly direct the attention of this Honorable Court to that fine opinion, not only because of the acute analytical powers employed and the precision of reasoning and exposition displayed by one of the leading jurists of the past two decades, but also because the decision is very recent and, despite the cases which respondent will certainly cite to support his position herein, all, or almost all, were considered by that strong Court and

found unpersuasive in a case very similar on its basic facts to the case at bar. In so doing, the Court re-affirmed the position it had taken in the earlier case of *Bowring vs. Bowers*, 24 Fed. 2nd, 918.

In *Audio G. Harvey,* 10 T. C. 183, taxpayer worked in Colombia under a three-year contract, the facts being almost identical with those in *Swenson vs. Thomas,* supra. The Commissioner acquiesces.

In *Myers vs. C.I.R.* (4th U.S.C.A.), 180 Fed. 2nd, 969, taxpayer was abroad only *one year and ten months.* The opinion in this case is strong and well-reasoned, and was concurred in by Chief Judge Parker, one of the illustrious jurists of the Federal Court system in our times. The Court found Myers to be a bona fide resident of a foreign country and, in doing so, follows its earlier decision in *C.I.R. vs. Swent* (4th U.S.C.A.), 155 Fed. 2nd, 513; cert. denied 329 U. S. 801.

In view of the fact that in all of the foregoing cases, the period of foreign residence ranged downward from three years to one year and ten months, it seems that Waddell's residence in Afghanistan, now reaching five and one-half (5½) years, does not suffer by comparison.

In the case of *Kyle vs. Jones,* (10th U.S.C.A.—1951) ____ Fed. 2nd ____, very recently decided, taxpayer testified that he never intended to stay in Saudi Arabia more than three years. His contract was for 18 months only, and he came home when it was completed. During his

absence, he maintained a home in the U. S., where his wife lived. The Court may have been justified in finding that Kyle was not a bona fide resident of Saudi Arabia under those circumstances, but the facts are sufficiently different from those in the case at bar so as to constitute no precedent, as is pointed out in the opinion which distinguishes the facts from those in *Swenson vs. Thomas,* supra, and *Myers vs. C.I.R.,* supra. But even this opinion is not clear-cut, as will appear from the vigorous dissent of Chief Judge Phillips. Whether Writ of Certiorari will issue in that case is not now known.

CONCLUSION

It is submitted that petitioner has proved his case; that respondent has offered only one item of evidence in opposition and that that item has been satisfactorily shown to be of superficial application only; that petitioner was a bona fide resident of Afghanistan during the entire year 1947 and is entitled to the benefits of Section 116, I.R.C.; that the decision of the Tax Court of the United States heretofore entered herein should be reversed and set aside and that respondent should take nothing from petitioner in this action.

Respectfully Submitted,
JAMES F. BUTLER
400 Continental Bank Building
Boise, Idaho
Attorney for Petitioner.

November, 1951.